JUL 1M 1969

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 86

MELVIN MORALES,

Petitioner,

vs.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	3
Statement	5
Summary of Argument	10
ARGUMENT:	
I. The Seizure of Petitioner by the New York City Police Violated Applicable Fourth Amendment Standards	11
II. The Exclusionary Rule Prevents Use of the Confessions Obtained From Petitioner After the Unlawful Seizure of His Person	19
A. The Confessions Should Be Excluded Without Reference to Voluntariness	21
B. Morales' Confessions Were Never Purged of the Taint of the Primary Illegality	28
III. In the Totality of the Circumstances Revealed by the Record Herein the Petitioner's Confessions Were Not Voluntary	33
Conclusion	36

TABLE OF AUTHORITIES

CASES:

Beck v. *Ohio*, 379 U.S. 89	12, 18
Beecher v. *Alabama*, 389 U.S. 35	34
Berger v. *New York*, 388 U.S. 41	20

Page

Bynum v. *United States*, 104 App. D.C. 368, 262 F. 2d 465 ..... 26, 27

Carroll v. *United States*, 267 U.S. 132 12
Clewis v. *Texas*, 386 U.S. 707 ..... 19, 34
Collins v. *Beto*, 348 F. 2d 823 ..... 20, 32
Columbe v. *Connecticut*, 367 U.S. 568 15

Davis v. *Mississippi*, —— U.S. ——, 89 S. Ct. 1394 ..... 11, 12, 13, 15, 17, 21, 26, 27
Davis v. *North Carolina*, 384 U.S. 737 ..... 34, 35

Elkins v. *United States*, 364 U.S. 206 21

Fahy v. *Connecticut*, 375 U.S. 85 20

Gilbert v. *California*, 388 U.S. 263 20
Greenwald v. *Wisconsin*, 390 U.S. 519 34

Haley v. *Ohio*, 332 U.S. 596 ..... 34, 35
Hansford v. *United States*, 122 App. D.C. 320, 365 F. 2d 920 31

Ker v. *California*, 374 U.S. 23 28

Lisenba v. *California*, 314 U.S. 219 36

Mapp v. *Ohio*, 367 U.S. 643 ..... 20, 21, 27
Miranda v. *Arizona*, 384 U.S. 436 ..... 16, 25, 31, 32, 33

Nardone v. *United States*, 308 U.S. 338 32

People v. *Johnson*, —— Cal. 2d ——, 450 P. 2d 865, 75 Cal. Rptr. 401 ..... 20, 25
People v. *Post*, 23 N.Y. 2d 157, 295 N.Y.S. 2d 665, 242 N.E. 2d 830 35
People v. *Robinson*, 13 N.Y. 2d 296, 246 N.Y.S. 2d 623, 196 N.E. 2d 261 20
People v. *Spencer*, 66 Cal. 2d 158, 57 Cal. Rptr. 163, 424 P. 2d 715 31

Reck v. *Pate*, 367 U.S. 433 34
Rogers v. *United States*, 330 F. 2d 535 30

Page

State v. *Traub*, 151 Conn. 246, 196 A. 2d 755, cert. denied 377 U.S. 960 30

Terry v. *Ohio*, 392 U.S. 1 ..... 11, 12, 16, 17, 21

Traub v. *Connecticut*, 374 U.S. 493 19

United States v. *Bayer*, 331 U.S. 532 31

Wong Sun v. *United States*, 371 U.S. 471 ..... 19, 20, 21, 26, 28, 32

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Case Comment, 44 Notre Dame Lawyer 485 (1969) 22

Del. Code Ann. tit. 11 §1902 (1953) 22

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LaFave, Arrest: The Decision to Take a Suspect Into Custody (American Bar Association: 1965) 22

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Page

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N.H. Rev. Stat. Ann. §594:2 (1955) 22
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R. I. Gen. Laws. Ann. §12-7-1 (1956) 22
Robinson, Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply, 1968 Duke L.J. 425 31
Uniform Arrest Act, §2 22
Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942) 22

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Opinions Below

The opinion of the New York State Court of Appeals (a certified copy of which is annexed to the certified record) is reported at 22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307. The opinion of the trial court determining the voluntariness of the confessions herein appears at pages 238-243 of the certified record.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 15, 1968. The remittitur was amended on June 6, 1968. The petition for a writ of certiorari was filed on August 10, 1968 and was granted on April 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1257. Pursuant to the requirement of 28 U.S.C. §1257 and Rule 23(1)(f) of this Court, the federal questions were timely and properly raised, as shown by the following passages from the opinion below, 22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307, and the decision amending the remittitur, 22 N.Y.2d 753, 292 N.Y.S.2d 130, 239 N.E.2d 221:

> "On this appeal defendant contends that his confessions should have been suppressed because they were evidence obtained as a result of an unreasonable seizure proscribed by the Fourth Amendment . . . we conclude that defendant's temporary detention for questioning represented a reasonable exercise of the police power." 22 N.Y.2d at 58-59, 290 N.Y.S.2d at 902, 238 N.E.2d at 310.
>
> "Upon the appeal herein, there were presented and necessarily passed upon the following questions under the Constitution of the United States. . . . Defendant argued that certain confessions admitted on the trial should have been excluded upon the ground that these confessions were obtained during his unlawful detention, and upon the further ground that the confessions were not shown to have been voluntary beyond a reasonable doubt. The Court of Appeals held that defendant's constitutional rights were not violated." 22 N.Y.2d 753-754, 292 N.Y.S.2d 130, 131, 239 N.E.2d 221.

Questions Presented

1. Whether the admission into evidence of petitioner's confessions given immediately after being taken to the police station violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth, upon the ground that the confessions were the product of an unlawful seizure of the petitioner's person by the New York City Police.

2. Whether the admission into evidence of petitioner's confessions violated petitioner's rights under the Fifth and Sixth Amendments made applicable to the States by the Fourteenth and also violated the due process clause of the Fourteenth upon the ground that the confessions were involuntary because taken from a known drug addict being held incommunicado and subjected to a prolonged interrogation without having been fully advised of his right to counsel.

Constitutional Provisions Involved

United States Constitution

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV: Section 1. All persons born or naturalized in the United States, and sub-

ject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

At about three o'clock in the morning on October 4, 1964 Mr. and Mrs. Lionel Wales, whose apartment is on the eleventh floor at 700 East 156th Street, were entertaining Mr. and Mrs. Dudley Carr and family (R. 289, 319).* Suddenly, they heard a woman's screams (R. 290, 319). Messrs. Wales and Carr ran into the hall to investigate (R. 319). They heard running footsteps, and the slamming or closing of a door (R. 321-322). Mr. Carr went to the elevator and pushed the button; when the elevator arrived, he looked in and saw a woman standing there, bleeding from the face (R. 320). Mr. Carr opened the elevator door, the woman staggered out, and Wales and Carr helped her into the hallway (R. 320-321). An ambulance attendant pronounced Mrs. Addie Brown dead at about 3:30 A.M. on October 4, 1964 (R. 352-353). A subsequent autopsy established that death was the result of multiple stab wounds (R. 254).

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* Unless otherwise indicated, numbers in parentheses refer to pages in the printed record in the Appellate Division of the New York Supreme Court.

Approximately one week later, or on or about October 11, 1964 the police rounded up and questioned known narcotics addicts in the neighborhood (R. 732-733, 394-395, 409). The police were informed that the petitioner, known to Detectives Carroll and Ferguson as an addict, had not been seen about since the killing (R. 362, 731-733). The police made several fruitless attempts to contact the petitioner through his mother (R. 361-363, 444-445, 462).

On October 13, 1964 Detectives Daum and Carroll followed Mrs. Morales from her house to, and "staked out", her beauty parlor (R. 364-365, 445-446). At about 8:00 P.M. the petitioner arrived by taxicab and was immediately taken into custody (R. 365-366). Detective Daum physically barred Mrs. Morales from speaking to her son (R. 125-126, 240, 817-819). The detective told Mrs. Morales that they would hold her son only for an hour or so (R. 123, 240, 818). According to Detective Daum, petitioner was not free to go when he was picked up (R. 463). Petitioner and the two detectives drove to the 42nd Precinct in the Bronx. They arrived at 8:30 P.M. and went into the lieutenant's office (R. 178, 365-366, 384-385, 448).

At this point, the testimony offered in the trial diverges. The police said that petitioner confessed almost immediately to Detective Carroll; thereafter reiterated his confession several times; and finally went to the scene and re-enacted the crime. Petitioner, on the other hand, said that his confessions were the product of threats, physical abuses and his illness from lack of drugs.

The Police Version:

Upon arriving at the station, petitioner encountered Detective Ferguson, a long-time acquaintance (R. 721-722). Petitioner assured Ferguson that he was innocent (R. 722,

735-736) and Ferguson left to check on petitioner's story that he was at his mother's house on the night of the murder (R. 723-724). Carroll went out to get coffee and cake (R. 449). Daum told the petitioner why he was being questioned; that he could remain silent; that he could have a lawyer at any time; that any answers he gave would be held against him (R. 449). Petitioner replied "I would rather talk to Detective Carroll" (R. 449). Upon Carroll's return, petitioner said, "You know, Carroll, I can't take a beating" (R. 366). Carroll told petitioner not to worry, to stop "making alibis", "building crutches" and "fences to hide behind". Carroll told petitioner that he could not lie to God (R. 367). After a few like remarks the petitioner said he would tell Carroll "exactly what happened" (R. 367). Thereupon, at about 8:45 P.M. (R. 366), petitioner told Carroll that on the morning in question he was sitting on a bench located in front of 700 East 156th Street; that he was feeling ill from lack of narcotics; that he saw a woman enter the building; that he followed her into the elevator; that he attempted to snatch her pocketbook; that when she resisted he began stabbing her with his knife; that he fled from the building, discarding knife and purse along the way (R. 367-368). Petitioner further stated that he purchased narcotics and returned home (R. 368). Carroll's notes of this confession were admitted as Defendant's Exhibit A (R. 1326).

After this confession to Carroll, Daum re-entered the room (R. 368, 450). Both Detectives, in substance, advised petitioner that he would have to repeat his story several more times that evening and that it would be in his own interest to reduce his story to written form, so no one could change it (R. 368-369, 451). Petitioner did so, asking Car-

roll how to spell certain words (R. 370, 451; People's Exhs. 8 and 8A). Thereafter, petitioner supplied some minor additional details of the crime to Carroll (R. 372-373) and repeated his confession several more times, including oral confessions to Detectives Ferguson, Golly and Durkin and a question and answer session, stenographically recorded, with assistant district attorney Rotker at 1:00 A.M. on October 14, 1964 (R. 494-500; 589-597; 671-677; 724-725). After making these confessions petitioner was taken to the scene, where he re-enacted the crime (R. 503-504, 599-600).

Detectives subsequently recovered the suit petitioner was wearing on the night in question. Police laboratory tests found no blood on the suit (R. 717), and an employee of the drycleaning establishment from which the suit was taken said that when the suit was brought in on October 5, 1964, she had seen no blood on it (R. 719). Tests for blood stains run on petitioner's rain coat proved negative (R. 717).

Petitioner's Version:

Petitioner stated that he was subjected to various forms of verbal and physical abuse from the time he was picked up by Detectives Daum and Carroll about 7:30-8:00 P.M. on October 13 (R. 913-915, 929); that he continued to protest his innocence, while being threatened and beaten (R. 917-920); that the effects of his withdrawal pains, and the harassment of the officers caused him to write out a statement (People's Exhs. 8 and 8A) dictated to him by Detective Carroll (R. 917-923, 929, 936). Petitioner denied that he had ever committed the murder of Addie Brown (R. 952-953); and stated that if he needed money, there was money to be had in his mother's apartment (R. 1034-1036).

Both the police witnesses and the petitioner agree that sometime after the "re-enactment" of the crime, around 4:00 A.M. on the morning of October 14, 1964, the petitioner was taken to the emergency room of Morrisania Hospital and given an injection of Sparine, apparently a standard treatment for the symptoms of narcotic withdrawal (R. 1089-1094; 1050-1051; 947-948).

The defense also offered the testimony of members of petitioner's family tending to substantiate his story that he was in his mother's apartment from 11:00 P.M. October 3, 1964 through 6:00 A.M. on October 4th.

A pretrial hearing was held in the Supreme Court, Bronx County, before Mr. Justice Gellinoff, who determined that the confessions were voluntary and that there was no evidence of police brutality (R. 238-243). Aside from the above evidence, the only other proof remotely relevant to connecting petitioner to the crime came out of the mouth of one Everett Roberts, whose value as a witness was so demolished on cross examination that the prosecutor himself moved to say in summation: "I don't put too much stock in the little boy that was called as a witness that had this crime being committed in October, November or December" (R. 1192).

Petitioner was convicted of the crime of murder in the first degree, felony murder, after a trial before Gellinoff, J., and a jury in the Supreme Court, Bronx County, New York, and is presently serving a sentence of life imprisonment in Clinton Prison, Dannemora, New York. His conviction was affirmed by the Appellate Division of the New York State Supreme Court, First Department (27 A.D.2d 904, 280 N.Y.S.2d 520) and by the Court of Appeals of

the State of New York (22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307).

Summary of Argument

The detention of petitioner was a seizure within the meaning of the Fourth Amendment, which is applicable to the states via the Fourteenth. On the authority of recent decisions of this Court, a seizure like this, having all the external indicia of a formal "arrest", i.e., removal of a citizen from the street by the police at a time and to a place selected by the police, must, to be a reasonable seizure, be founded upon probable cause or be pursuant to a warrant based on probable cause. The police had neither probable cause nor a warrant; therefore the seizure of the petitioner upon suspicion was unreasonable. The confessions obtained shortly after the unreasonable seizure should be held to be inadmissible at trial on one of two grounds: (a) exclusion of the confessions will serve to deter police in the future from making similar seizures; or (b) the exclusionary rule bars the confessions as "fruit of the poisonous tree" unpurged of the primary taint of the initial illegal seizure. Finally, the record does not support a finding that the confessions were voluntary. If this Court finds the confessions inadmissible on any of the above grounds, the conviction founded thereon is violative of due process and must be reversed.

ARGUMENT

I.

The Seizure of Petitioner by the New York City Police Violated Applicable Fourth Amendment Standards.

This case directly presents the question reserved in *Terry* v. *Ohio*, 392 U.S. 1, 19 n. 16: "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or investigation." Thus, this Court is once again faced with the task of applying applicable standards under the Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Regardless of the label attached to describe what happened to Morales, be it "arrest", "stop", or "detention", Fourth Amendment standards apply. *Terry* v. *Ohio, supra,* 391 U.S. at 19; *Davis* v. *Mississippi,* —— U.S. ——, ——, 89 S.Ct. 1394, 1397. In keeping with the outline of the *Terry* opinion, the ultimate conclusion about the reasonableness of the conduct of Detectives Daum and Carroll lies in balancing the governmental interests involved against the nature and quality of the intrusion. 392 U.S. at 20-21. Although the New York State Court of Appeals, writing prior to *Terry,* did in fact go through the mechanics of the balancing process, our point is that the Court misread the scales.

To cull from *Terry* once more, the crux of this case is whether there was justification for the invasion of Morales' right to be free from a seizure of his person. 392 U.S. at 23. Put another way, "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" 392 U.S. at 22. What will permit the intrusion upon the personal security of any citizen when that intrusion takes the form of "the harassment and ignominy incident to involuntary detention"? *Davis* v. *Mississippi*, —— U.S. ——, ——, 89 S.Ct. 1394, 1397. What must the police have to exercise the penultimate act of official control over our citizenry?

For a seizure like that in the present case, the Fourth Amendment requires the police action be based on the same criteria as an "arrest". In *Davis* v. *Mississippi, supra*, the Court clearly indicates that the taking of fingerprints by the police is permissible only if their access to the individual is founded on judicial authorization or a detention founded upon probable cause. If the taking of John Davis' fingerprints on December 3, 1965 during a period of detention neither voluntary nor predicated upon probable cause does not square with the requirements of the Fourth Amendment, then the taking of Morales' person into custody for purposes of interrogation also violated the Fourth Amendment unless there was probable cause. And of probable cause there was none. The police lacked facts that would indicate to a man of reasonable caution that the petitioner was the guilty party. See *Terry* v. *Ohio*, 392 U.S. 1, 22; *Beck* v. *Ohio*, 379 U.S. 89, 97; *Carroll* v. *United States*, 267 U.S. 132, 161. This being so, it follows that Melvin Morales was unreasonably detained within the

meaning of the Fourth Amendment. *Davis* v. *Mississippi, supra.*

The dearth of information upon which the police acted is amply revealed by the record. To illustrate:

According to Detective Ferguson, who had known Melvin Morales "since he was a little boy" (R. 731), on or about October 11 or 12 the police "rounded up several narcotic users; we call them junkies, in the vicinity. And we had conversations with them. * * * As a result of our conversations wih [sic] these junkies, we then concentrated our efforts in an effort to locate Morales" (R. 732-733). Morales' name was one of many mentioned in connection with the investigation (R. 69). The police concentration on finding Morales coincides with the junky roundup (R. 47, 459, 812). The information yielded from the roundup is patently the prime motive behind the seizure of Morales. Detective Carroll testified:

> "During the course of the investigation it was ascertained that the defendant Morales had been a constant and habitual frequenter of the area and could have been seen at almost any time of the day or night in the area, and that shortly after this thing occurred, that he had absented himself therefrom. And it appeared to us in our investigation and in our thinking, that it would be proper and pertinent to find him and to question him" (R. 394-395). * * * "I became aware of this information about two days prior to apprehending the defendant" (R. 409).

And if that is not enough to show that the seizure of Morales was the end product of the barest guesswork, consider the following brief exchanges:

First, on the preliminary hearing to determine voluntariness, this passage comes during trial counsel's cross examination of Detective Carroll:

> Q. All right. Was he a suspect in connection with the homicide that occurred on October 4th? * * *.
>
> The Court: Explain to him what you mean by the word "suspect." * * * If I were a cop on a homicide investigation, everybody is a suspect. I'd rule out nobody. Everybody is a suspect in my mind.
>
> Now, is that what you mean?
>
> Q. Did you have any reason in your mind at the time to believe that this defendant was connected either directly or indirectly with that homicide which occurred on October 4, 1964? Yes or no? A. That's what I wanted to question him about. I concur with the Judge. Everybody is a suspect.
>
> Q. All right. Now, did you have any idea in your mind, sir, that this defendant was possibly connected in one way or other with that homicide? Yes or no? A. Not particularly (R. 84-85).

Second, on the main trial during cross examination Carroll said:

> Well, at the time that I apprehended him in front of the beauty parlor, and as he alighted from the cab at that point, I didn't have anything against him that would definitely pin him to the homicide. It was only the subsequent questions thereto that brought out what it brought out (R. 404).

And on the very next page of the record:

> Q. All right, did you suspect he was the killer? Thank you, sir. A. Truthfully, no, I was dubious.

> Q. Fine, you were dubious. So now, having been dubious, were you also dubious when you arrived at the police station the first time before you interrogated this defendant? A. I was still dubious (R. 405).

In anticipation of respondent's argument that in spite of this admitted lack of probable cause, the seizure of Morales was reasonable, Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 39-40, *Morales* v. *New York,* No. 668 Misc. O.T. 1968, we turn to an elaboration why none of the factors leading to the Court of Appeals determination of reasonableness supports that conclusion. These factors, concluded the Court of Appeals, warranted the seizure of Melvin Morales, in spite of its statement: "It may be conceded that the apprehending detectives did not have probable cause to justify the arrest of defendant at the time they took him into custody. Moreover, the record does not support a finding that the defendant consented to his detention and questioning." 22 N.Y.2d at 58, 290 N.Y.S.2d at 902, 238 N.E.2d at 310.

First, said the Court of Appeals, a serious crime had been committed and there was a "lack of practical alternative investigative techniques." 22 N.Y.2d at 64, 290 N.Y.S.2d at 907, 238 N.E.2d at 313, citing, *inter alia,* the prolix dictum of Mr. Justice Frankfurter in *Columbe* v. *Connecticut,* 367 U.S. 568. There is no support for a finding of reasonableness here. In answering a similar argument advanced in *Davis* v. *Mississippi,* —— U.S. ——, ——, 89 S.Ct. 1394, 1397 this Court said: "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." And if the police were merely interested in getting Morales' voluntary answers

there was an obvious alternative to taking him off the street and into the stationhouse. Having located Morales it should have been just as easy to solicit his voluntary answers on the spot or in his mother's place of business, in front of which Morales was seized.

Which brings us to a second basis for the finding of reasonableness below. "Police station interrogation facilitates questioning because trained investigators and stenographic facilities are present. Its privacy eliminates the distractions caused by crowds which may form during questioning conducted on the street." 22 N.Y.2d at 63, 290 N.Y.S.2d at 906, 238 N.E.2d at 313. To say that stationhouse interrogation is reasonable because of the superiority of that place for the conduct of inquiry simply overlooks, among other things, that this is essentially what led to *Miranda* v. *Arizona*, 384 U.S. 436, 455, 457, and to the stringent safeguards against detention in that place for that purpose written into the Bill of Rights. See *Terry* v. *Ohio*, 392 U.S. 1, 38-39 (dissenting opinion).

Third, the Court of Appeals pointed to the modest length of the proposed period of detention, apparently relying on Detective Daum's statement to Mrs. Morales that the officers were "only going to take [petitioner] down for questioning and keep him for maybe an hour" (R. 123). 22 N.Y.2d at 58, 61, 64, 290 N.Y.S.2d at 901, 904, 907, 238 N.E.2d at 309, 311, 313. It does not appear that a similar statement was ever made to Morales. Daum's self-serving time limit reflects, we suggest, his attempt at allaying Mrs. Morales' anxiety, getting her out of the way, if you will, thus proving that he was not bereft of reason, as the trial judge said Daum would have had to be "to let the mother talk to the son at that point" (R. 240). The offi-

cers' actions here speak for the only rational inference—they wanted Morales in their exclusive control and custody for accusation and interrogation for as long as necessary, i.e., until he confessed.

Fourth, said the Court of Appeals, "it must be noted that defendant was not formally arrested on a charge of crime within the meaning of our arrest statute, section 167 of the Code of Criminal Procedure." 22 N.Y.2d at 59, 290 N.Y.S.2d at 902, 238 N.E.2d at 310. This characterization of what happened as a technical "non-arrest" is (a) meaningless, *Davis* v. *Mississippi*, —— U.S. ——, ——, 89 S.Ct. 1394, 1397; *Terry* v. *Ohio*, 392 U.S. 1, 19; and (b) a further buttress to the conclusion that there was simply no probable cause, as required.

Fifth, according to the Court of Appeals, Morales "was the only person the police could have reasonably detained for questioning" since the "checkerboard square of the police investigation, although resting upon circumstantial evidence, pointed only to" Morales. 22 N.Y.2d at 64, 290 N.Y.S.2d at 907, 230 N.E.2d at 313. Eyewash. There are sixty-four squares on a checkerboard, and in this case the police had filled in only two squares: (i) he was an addict whose mother lived in the same multi-story building in the same public housing project as the victim; and (ii) other "junkies", who had been rounded up (R. 732-733), or one of that group, apparently had not seen Morales since the crime, and so informed the police. A holding that these two tenuous pieces of intelligence helped form a rational predicate for the seizure of Morales' person would equal a holding that like individuals with a similar familial nexus with the neighborhood could have been seized at the

will of the police. This cannot be. *Beck* v. *Ohio*, 379 U.S. 89, 97.

In sum, none of the listed factors, taken singly or in the aggregate can add up to a holding that the seizure of the defendant was reasonable within the meaning of the Fourth Amendment. We are not unmindful that the Court of Appeals went to considerable trouble to say:

> Nothing is more offensive to our deep concern for the dignity of the individual than unnecessary restraint by the police. Lengthy detention on mere suspicion breeds abuse of those safeguards which a civilized society must erect to protect even the most reprehensive of its members. However, the possibility that power given to law enforcement officers may be abused does not require that they be left powerless to make reasonable inquiry. The reasonableness of their behavior may be assured by close judicial supervision of the methods used.
>
> It is recognized that detention for questioning has its manifest evils and dangers. This decision is, therefore, limited to the exceptional circumstances presented on this appeal involving a serious crime affecting the public safety. We hold merely that a suspect may be detained upon reasonable suspicion for a reasonable and brief period of time for questioning under carefully controlled conditions protecting his Fifth and Sixth Amendment rights. Mass detentions for questioning are never permissible. The scope of the authority to question is limited to those persons reasonably suspected of possessing knowledge of the crime under investigation in circumstances involving crimes presenting a high degree of public concern affecting the public safety. [22 N.Y.2d at 64-65, 290 N.Y.S.2d at 907, 238 N.E.2d at 313-314.]

We submit that the purported protection provided petitioner's Fifth and Sixth Amendment rights does not help answer the Fourth Amendment question whether the detention of Morales violated the constitutional proscription against unreasonable seizures. The claimed acknowledgement of defendant's rights under the Fifth and Sixth Amendments relates to a separate question, i.e., whether the statements taken can be used as evidence, the Fourth Amendment violation notwithstanding—whether the intervening mention of Morales' right to remain silent, to counsel and of the possibility of his statements being used against him sufficiently purges the confessions of the primary taint of the unlawful seizure. *Wong Sun* v. *United States*, 371 U.S. 471, 488, 491. It is to the application of the exclusionary rule to this case that we now turn.

II.

The Exclusionary Rule Prevents Use of the Confessions Obtained From Petitioner After the Unlawful Seizure of His Person.

If this Court agrees with our first premise, that the police activity here violated the Fourth Amendment proscription against unreasonable seizures, the next question to be answered is whether statements made during the period of unlawful detention should be barred by the exclusionary rule that "verbal evidence which derives so immediately from . . . an unauthorized arrest" cannot be used upon trial. *Wong Sun* v. *United States*, 371 U.S. 471, 485-487. Although the opinion in *Clewis* v. *Texas*, 386 U.S. 707, hints at doubt about the applicability of *Wong Sun* to state trials, 386 U.S. at 711, n. 7, the disposition of *Traub* v. *Connecticut*, 374 U.S. 493, in which this Court remanded

a state conviction for reconsideration in light of *Wong Sun* and *Ker* v. *California*, 374 U.S. 23, can be, should be and has been read to indicate such applicability. See, *e.g.*, *Collins* v. *Beto*, 348 F.2d 823, 826; *People* v. *Robinson*, 13 N.Y.2d 296, 301, 246 N.Y.S.2d 623, 625, 196 N.E.2d 261, 262; *People* v. *Johnson*, —— Cal.2d ——, 450 P.2d 865, 75 Cal. Rptr. 401, 403; Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L.R. 483, *passim* (1963); LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters* and Beyond, 67 Mise. L.R. 40, 110 (1968); cf. *Gilbert* v. *California*, 388 U.S. 263, 273; *Berger* v. *New York*, 388 U.S. 41, 52; *Fahy* v. *Connecticut*, 375 U.S. 85, 91. If it were otherwise, there would exist the very "double standard" and incongruence inveighed against in *Mapp* v. *Ohio*, 367 U.S. 643, 657-660.

The opinion of the Court of Appeals and the Respondent's Brief in Opposition to Petition for Certiorari, pp. 10, 40-43, *Morales* v. *New York*, No. 668 Misc. O.T. 1968, lay great stress, for different reasons, on the police testimony that Morales had been told about some of his rights. As we have indicated at the end of our first point herein, the Court of Appeals reference to the giving of the so-called warnings after Morales was securely in hand was one of the factual elements leading to the Court's conclusion that the seizure was reasonable, an effect that the warnings cannot have because probable cause alone is the standard for measuring the reasonableness of the seizure. The respondent's use of the claimed warnings is more to the point, that is, whether taking the warnings given and the other circumstances together the "primary taint" of the unlawful seizure of Morales' person had been sufficiently dissipated to take the confessions out of the reach of the exclusionary rule under *Wong Sun*.

We offer alternative reasons why this Court should hold the confessions herein barred by the exclusionary rule:

(i) the "major thrust" of the exclusionary rule is deterring unlawful police conduct, *Terry* v. *Ohio,* 392 U.S. 1, 12, and that end would be best served by application of the rule to this case, regardless of the claimed voluntariness of the confessions; and (ii) under the circumstances of this case Morales' responses to the police questioning were not "sufficiently an act of free will to purge the primary taint" of the unlawful seizure. *Wong Sun* v. *United States,* 371 U.S. 471, 486.

A. The Confessions Should Be Excluded Without Reference to Voluntariness

The essential purpose of the police activity here was to obtain custody of the petitioner for interrogation. The police had two means of effectuating that purpose without running afoul of the Constitution. The officers could have either requested Morales to consent to interrogation at the stationhouse; or seized the petitioner upon probable cause, or pursuant to a warrant. *Davis* v. *Mississippi,* —— U.S. ——, 89 S.Ct. 1394. The police made no attempt at the former, and had no basis for the latter. Since the police adopted an unlawful means to secure Morales' attendance, a sensible result is for this Court to bar the usufruct because "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it.' *Elkins* v. *United States, supra* [364 U.S. 206], at 217." *Mapp* v. *Ohio,* 367 U.S. 643, 656.

What would be discouraged by application of the exclusionary rule is the fairly common police practice of seizing a "suspect", without having adequate grounds for a formal arrest, for purposes of conducting in custody interrogation. See, *e.g.*, LaFave, Arrest: The Decision to Take a Suspect into Custody (American Bar Foundation: 1965), 300-318, 342-351, 497-499; The Uniform Arrest Act §2 (adopted by three states: Del. Code Ann. tit. 11, §1902 [1953]; N.H. Rev. Stat. Ann. §594:2 [1955]; R.I. Gen. Laws Ann. §12-7-1 [1956]; Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942); Case Comment, 44 Notre Dame Lawyer 485, 487-488 (1969); American Bar Foundation, Law Enforcement in the Metropolis (McIntyre, ed. 1967) 78-84.

Our position is essentially based on the views reflected in the American Law Institute Model Code of Pre-Arraignment Procedure (Tentative Draft No. 1, 1966). Sections 3.01 and 9.02 illustrate the rule we urge this Court to adopt. The "Note on Section 3.01" (Tent. Draft, p. 11) says:

> "This section requires that an arrest without a warrant be made on reasonable cause to believe that the person to be arrested is guilty of a felony or, in circumstances of necessity, of a misdemeanor. Thus the Code rejects 'investigative' arrests or arrests 'on suspicion.' And to maintain the integrity of the reasonable cause standard, particularly in view of the Code's authorization for a period of in-custody screening following an arrest without a warrant, Section 9.02 requires exclusion of statements following an arrest made without fair basis for belief that there was a reasonable cause. The term reasonable cause is the usual statutory equivalent of the Fourth Amendment's 'probable cause' standard."

See also, Commentary, Tentative Draft, pp. 107-109.

The Model Code deterrent is found in Section 9.02:

Section 9.02. Statements Made After an Illegal Arrest.

If a law enforcement officer, acting without a warrant, arrests a person without the reasonable cause required by Section 3.01, and the court determines that such arrest was made without fair basis for the belief that such cause existed, no statement made by such person after such arrest and prior to his release, unless it is made in the presence of or upon consultation with counsel, shall be admitted in evidence against such person in a criminal proceeding in which he is the defendant.

The rationale for this rule of exclusion is put as follows, in the notes to the above section, Tentative Draft, pp. 64-65:

This section deals with statements made after an illegal arrest. It is not addressed to the problem of statements made after such an arrest which can be deemed to be the product of coercion (see the discussion of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), in the Commentary to this Article); that problem is dealt with through the warning provisions of the Code, and through Section 5.04. Rather, the section deals with statements which are by hypothesis voluntary, but which are given during custody following an arrest made in disregard of the "reasonable cause" requirement of Section 3.01. In such cases, exclusion cannot be justified as a protection of an arrested person's right to make an uncompelled choice whether or not to cooperate, because only in an at-

tenuated sense can the making of the statement be said to have been "compelled" by the illegality of the arrest. This section is, rather, an attempt to prevent abuse of the Code's provisions permitting screening following arrest.

* * * * *

Because its purpose is to deter the "investigative" arrest, this section provides for exclusion only where the arrest was made without fair basis for a belief that reasonable cause existed. Thus exclusion would not be required where the officer acted in good faith, under emergency circumstances and with colorable justification, even though a court may later determine that he made a mistake.

Where the "reasonable cause" requirement is ignored, this section does not permit use of statements even after a proper warning has issued. Since the Code requires a warning in any event, providing in this section for cure by warning would mean that no substantial additional deterrent would have been imposed to the investigative arrest; for surely the central problem of the investigative arrest is not that it is made in the hope of obtaining an immediate spontaneous admission.

The section does provide for one amelioration to the flat rule that even voluntary statements following such an arrest must be excluded: even in the case of the illegal arrest, a statement made on advice of counsel, and thus likely to represent not merely a voluntary act but one made on the basis of a tactical assessment of the situation, would be admissible. Such an ameliora-

tion would not significantly lessen the deterrent force of this section.

* * * * *

To allow use of even a voluntary statement made as a result of questioning during a period of illegal stationhouse detention would permit the authorities to make the unlawful seizure in the hope of receiving a waiver of Fifth and Sixth Amendment rights, thus allowing the violation of the Fourth Amendment to become the "instrument of a bootstrap operation to insulate unlawful police activities from the effects of the exclusionary rule." *People* v. *Johnson*, —— Cal.2d ——, 450 P.2d 865, 871, 872, 75 Cal. Rptr. 401, 406, 407. This very danger has been recognized by other perceptive writers. See Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 603-604 (1968); LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters*, and Beyond, 67 Mich. L. Rev. 40, 109-110 (1968); A.L.I. Model Code of Pre-Arraignment Procedure (Tent. Dr. No. 1, 1966), *supra*, 65. On the other hand, the salubrious effects for the system of justice flowing from application of the exclusionary rule are several.

The exclusion of any confession obtained during a period of unlawful detention should give the quietus to a variety of derelict practices—the roundup or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge (see Hogan and Snee, The McNabb-Mallory Rule, Its Rise, Rationale and Rescue, 47 Geo. L.J. 1, 22)—thereby rounding out the protection of the citizen from "an unfettered right to detention." *Miranda* v. *Arizona*, 384 U.S. 436, 482. Further, the rule we here advocate, exclusion of even voluntary statements obtained

during a period of detention founded upon a violation of the Fourth Amendment is precursed by both *Wong Sun* v. *United States*, 371 U.S. 471, and *Davis* v. *Mississippi*, —— U.S. ——, 89 S.Ct. 1394. In *Wong Sun*, this Court rejected the Government argument that Toy's statements were admissible, on the ground that under the "circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." 371 U.S. at 486. If this were all that appeared, then the speculation that *Wong Sun* was "a false start on the problem finally resolved in *Miranda*, LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters* and Beyond, 67 Mich. L. Rev. 40, 113 (1968), might have a more substantial claim to accuracy. But that is not all that appears. At the end of the just quoted passage from *Wong Sun*, 371 U.S. at 486, the Court dropped a footnote wherein it said: "Even in the absence of such oppressive circumstances, and where an exclusionary rule rests principally on nonconstitutional grounds, we have sometimes refused to differentiate between voluntary and involuntary declarations. See Hogan and Snee, The McNabb-Mallory Rule, Its Rise, Rationale and Rescue, 47 Geo. L.J. 1, 26-27," citing, as one analogous example, *Bynum* v. *United States*, 104 App. D.C. 368, 262 F.2d 465. We are not alone in reading this part of *Wong Sun* as showing the propriety of the application of the exclusionary rule in a case like Morales'. See Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483, 485, 564-578, esp. 572 (1963).

The *Bynum* case, *supra*, provides the connective for our assertion that exclusion of even voluntary confessions obtained by the authorities through access to the petitioner

while he was being held in violation of the Fourth Amendment is mandated. A simple paraphrase from the relevant part of the *Bynum* opinion, quoted in *Davis* v. *Mississippi*, —— U.S. —— at ——, 89 S.Ct. 1394 at 1396-1397, will illustrate:

> Fingerprints, articles taken from a prisoner's possession and statements given during detention have the decisive common characteristic of being something of evidentiary value which the authorities have caused an arrested person to yield to them during illegal detention. If fingerprints taken during an illegal detention are proscribed, and articles taken from a prisoner's possession are proscribed, by the same token a statement given during an illegal detention must be proscribed.

Exclusion of the confessions here, following as they did on the heels of the violation of Morales' Fourth Amendment rights, would fit precisely into the exclusionary rule. Without exclusion of Morales' confessions the constitutional guaranty against an unreasonable seizure becomes a mere "form of words," *Mapp* v. *Ohio*, 367 U.S. 643, 655, and our courts become parties to "lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Terry* v. *Ohio*, 392 U.S. 1, 13.

Finally, if the voluntary nature of any confession given so soon after the violation of the constitutional right of privacy under the Fourth Amendment permits the use of that confession, the Fourth Amendment has been relegated to a secondary place in the constellation of rights protected by the Bill of Rights. This cannot be, because

the individual freedom safeguarded by that Amendment "has been declared 'as of the very essence of constitutional liberty' the guaranty of which 'is as important and as imperative as are the guaranties of the other rights of the individual citizen.'" *Ker* v. *California*, 374 U.S. 23, 32.

B. Morales' Confessions Were Never Purged of the Taint of the Primary Illegality

If the Court does not accept our position that the exclusionary rule reaches the confessions herein regardless of voluntariness, *Wong Sun* v. *United States*, 372 U.S. 471, nevertheless requires a holding that the confessions herein should have been barred from the trial because they were the tainted fruit of the primary illegality—the unlawful seizure of Morales and the equally unlawful detention of his person at the stationhouse. As indicated earlier, we anticipate that respondent will argue that the confessions were the product of "an intervening independent act" of Morales' free will, which sufficiently dissipates the impact of the initial illegality. See *Wong Sun* v. *United States*, *supra*, 371 U.S. at 486. Further, we expect that the respondent will point to the warnings given to Morales by both seizing officers to buttress this "attenuation" argument.

Our counter-argument comes to this: Morales' responses were made in circumstances that make it unreasonable to infer that they were sufficiently an act of free will to purge the primary taint; rather, they are the result of the police exploitation of the advantage gained through the illegal seizure. See *Wong Sun* v. *United States*, 371 U.S. 471, 486, 488.

Morales was picked up by the police while he was obviously en route to his mother's place of business; as soon as he alighted from the taxicab he was taken by Detective Carroll and placed in Daum's car; the ride to the station-house, according to the testimony of both officers, was singularly free from any conversation relating to the purpose and destination of the trip (R. 46, 47, 50, 78, 172, 183, 447, 462); upon arrival, he was taken forthwith to the lieutenant's office. At this point Morales apparently encountered detective Ferguson who asked Morales whether he had killed Mrs. Brown. Morales denied his guilt and said that he had been in his mother's apartment at the time of the murder. After Ferguson left to check his alibi, Daum told Morales that he was under no compulsion to talk, could have an attorney, and that any statement made could be used against him. Morales expressed a preference to talk to Carroll. When Carroll reappeared, with coffee and cake, the first words out of Morales' mouth were: "You know, Carroll, I can't take a beating" (R. 366).

Carroll replied: "Nobody will lay a hand on you. Stop making alibis. You're building crutches to lean upon and fences to hide behind. There is only one thing you can't do, you can't lie to yourself. You can't lie to God. Do you believe in God?" (Morales—"Yes, I do.") "Well, between you and your God, did you do this thing?" (R. 367).

Morales answered: "Yes, I did" (R. 367).

Then, and only then, did Carroll reiterate the incomplete description of Morales' rights. The first full confession came immediately thereafter.

Following that, his two advisor-interrogators promptly pulled a bit of chicanery. "Daum told Melvin Morales

that he would have to repeat his story several times; that he would have to tell the story to the detective who was carrying the case; he would probably have to tell his story to the man from the Homicide Squad; and that, later, if the District Attorney came over, he would have to tell his story to him" (R. 368, 437-438, 451). At this point Carroll broke in to add that he "would not add to his statement or detract from it one whit. . . . I said to him that in order that the statement not be changed, why did he not write it down for us in his own handwriting" (R. 368-369, 437-438, 451).

Morales complied, yielding what is the second confession (R. 1308, 1310).

Upon reaching this point we can imagine counsel for respondent saying: "See! Morales was humanely treated and confessed even after being told about some of his rights at a time when the police weren't required to tell him anything. Purgation! Attenuation!" Not so.

We submit that the evidence here indicates that the unlawful detention was an "operative factor" in bringing about the confessions, *State* v. *Traub*, 151 Conn. 246, 196 A.2d 755, 757, cert. denied 377 U.S. 960; that the confessions "are so inextricably bound up with an illegal arrest so as to become 'tainted'", *Rogers* v. *United States*, 330 F.2d 535, 541. Before the taint can be said to have been purged it must appear that the illegal detention made no ascertainable contribution toward eliciting the confessions. And in this case the illegal detention was obviously meant to, and did, operate as a means of enhancing the likelihood of extracting an admission of guilt. Certainly if the police want to create an atmosphere conducive to success-

ful interrogation, there is no better place than the station-house, where the interrogators "'possess all the advantages'". *Miranda* v. *Arizona*, 384 U.S. 436, 450. Even the humane attitude assumed by the police is a recognized auxiliary means of leverage. Id. at 451. One author has gone so far as saying: "Before *Miranda*, not only was the warning useful in warding off legal attacks, but it also had its utility as a ploy in obtaining confessions." Robinson, Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply, 1968 Duke L.J. 425, 469. The overall atmosphere created by the unlawful seizure here must be seen as it was intended to be—oppressive, intimidating. The conduct of the officers, including laying in a supply of goodies, should indicate to anyone that all were settling down for an extended session. Add to this the fact that Morales was a known addict, a member of a group known to be prone to show disorientation, lack of judgment, and emotional instability, *Hansford* v. *United States*, 122 App. D.C. 320, 365 F.2d 920, 922, and the totality of the circumstances points to the inference that the initial advantage gained by the police must have contributed to the confessions; it would be unreasonable to infer that it was solely an act of free will that produced Morales' confessions. Rather, the apter conclusion is that the evidence of guilt was come at by exploitation of the advantage gained through the illegal seizure of Morales' person. Good sense reveals no break in the connection between the unlawful detention and the first confession, the first confession and its progeny, the ensuing confessions, see *United States* v. *Bayer*, 331 U.S. 532, 540-541; *People* v. *Spencer*, 66 Cal.2d 158, 167-168, 57 Cal. Rptr. 163, 170, 424 P.2d 715, 722. Good sense shows no taint purged, no

attenuated link, to warrant any conclusion other than that the confessions were one and all the forbidden produce of the seizure. *Cf. Nardone* v. *United States*, 308 U.S. 338, 341. Declarations so directly derivative from illicit conduct must be, and are, barred under the exclusionary rule. *Wong Sun* v. *United States*, 371 U.S. 471, 486, 488.

The alleged warnings given to Morales so close in time to his arrival at the stationhouse did not constitute a significant change in the circumstances to permit a finding that there was any diminution of the devastating psychological impact of the unlawful arrest. See *Collins* v. *Beto*, 348 F.2d 823, 828; *cf. Wong Sun* v. *United States*, 371 U.S. 471, 491. In this connection, several empirical studies have indicated that the usual frame of mind of one brought suddenly into intimate contact with the police at their base is consternation and confusion, and one study establishes that even those in police custody who received the fourfold warnings of *Miranda* v. *Arizona*, 384 U.S. 436, evinced marked misunderstanding of their meaning and implications. Medalie, Zeitz, and Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L.R. 1347, 1372-1379, 1396-1398 (1968); see also Interrogation in New Haven: The Impact of Miranda, 76 Yale L.J. 1519, 1613-1614 (1967); Griffiths and Ayres, A Postscript to the Miranda Project: Interrogation of Draft Protesters, 77 Yale L.J. 300, 309-310 (1967). In light of this, the rapid fire succession of events from seizure at 8:00 P.M., the silent ride to the stationhouse, the first mention of his rights at about 8:30 P.M. and the immediately ensuing interrogation leading to the first damning utterance at about 8:45 P.M. indicates that Morales hardly had time to think about anything, let alone

the merits of the police remarks about his right to counsel and to remain silent.

Finally, we do not mean to say that no voluntary confession can ever follow a period of unlawful detention. What we do mean to say is that an admission of guilt emerging from a course of lawless police conduct designed to encourage the giving of a confession must carry the stigma of the conduct, the taint of the primary illegality. The illicit mating of Morales' initial unlawful detention and the conduct of the interrogation must be seen as bastardizing his confessions, and these illegitimate offspring should be barred from court.

III.

In the Totality of the Circumstances Revealed by the Record Herein the Petitioner's Confessions Were Not Voluntary.

The admission into evidence of Morales' confessions violated due process because those confessions were involuntary. While Morales cannot claim the protection of *Miranda* v. *Arizona*, 384 U.S. 436, we note that if that case applied here the confessions would be barred. Although counsel urged the involuntariness of Morales' confessions before the New York State Court of Appeals, that Court swept the issue aside, saying: "Our review of the other questions raised on this appeal finds no error. . . . " 22 N.Y.2d at 65, 290 N.Y.S.2d at 907, 238 N.E.2d at 314.

Notwithstanding the findings of the courts below, this Court has the "duty in this case . . . dealing with the question whether a confession was voluntarily given, to ex-

amine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis* v. *North Carolina*, 384 U.S. 737, 741-742. A realistic appraisal of the facts in this case (*Beecher* v. *Alabama*, 389 U.S. 35, 38), taking only the prosecution version of the facts as representing the totality of the circumstances (*Clewis* v. *Texas*, 386 U.S. 707, 708), and disregarding the petitioner's claim of brutality (*Greenwald* v. *Wisconsin*, 390 U.S. 519, 521) compels the conclusion that the confessions herein were not voluntarily given.

Recognizing that each case must turn on its own facts (*Reck* v. *Pate*, 367 U.S. 433, 442) we submit that substantial doubt about the voluntariness of the confessions is generated by the following:

Morales was a drug addict, and Detective Carroll knew it (R. 392). Morales was whisked off the street, without any probable cause for his detention. The shock value of that event on one of those unfortunates of notorious instability certainly must have undermined any power to make a truly voluntary confession. *Cf. Clewis* v. *Texas*, 386 U.S. 707, 711, 712. He was deliberately cut off from his only ally in the field, his mother, and taken to a place not revealed to her. It is undisputed that when Mrs. Morales attempted to counsel her son at the time he was taken into custody, she was denied access to him (R. 817-819). The trial judge, at the close of the pretrial hearing on the question of voluntariness, said that the officers would "have to have their heads examined to let the mother talk to the son at that point" (R. 242). This Court has said: "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them." *Haley* v. *Ohio*, 332 U.S. 596, 601.

Morales was not told anything until after he had been safely removed to the privacy of the stationhouse (R. 46, 47, 50, 78, 172, 183, 447, 462). At the stationhouse, neither Daum nor Carroll ever advised Morales of all his rights, omitting any mention of the availability of assigned counsel to one who patently could not afford to hire one. *Cf. People* v. *Post*, 23 N.Y.2d 157, 295 N.Y.S2d 665, 242 N.E.2d 830. Adding this weighty factor (*Davis* v. *North Carolina*, 384 U.S. 737, 741) to the ensuing false statement that Morales was under an obligation, having once confessed, to repeat that confession to a string of oncoming interrogators (R. 368-369, 437-438, 451) and it is almost as if no warnings had been given. Further, Morales' first statement to Carroll, "You know, Carroll, I can't take a beating" (R. 366), indicates a man in fear, rationally or not, who could expect no solace in his isolation from the outside world.

Following his initial oral and written confessions, Morales recited for a parade of police officers and an assistant district attorney quizzing him singly, in pairs and in concert (R. 724, 743, 744, 498-499, 589, 590-593, 671, 673, 677). His final performance was a re-enactment of the crime at the scene sometime after 1:00 A.M. on October 24, 1964 (R. 599-600, 673).

Two events subsequent to the above incriminatory incidents should be evaluated for the possible light they shed on the question of voluntariness. See *Haley* v. *Ohio*, 332 U.S. 596, 600. Morales was taken to a local hospital at about 4:00 A.M. on October 14, 1964 to be treated for narcotic withdrawal symptoms (R. 947-948, 1089-1094, 1050-1051) lending some credence to his claim that he was suffering from withdrawal pains during the course of his earlier interrogations (R. 920). A second event that merits

some comment tends to indicate that Morales' tractability at the stationhouse is attributable to something other than an unfettered act of his free will. Several days after his arraignment, on October 20, 1964 to be exact, Morales was visited at the Bronx House of Detention by Detectives Durkin and Carroll (R. 656). The formerly lamb-like Morales, now removed in time, space and circumstances from the kind of domination that surrounded his interrogation on October 13-14, flatly refused to speak to the officers because he had been told not to (R. 660). In brief, the now dried-out Morales was possessed of a resolve and clear understanding of his right not to talk to the police that was lacking a week earlier when he was under the sole domination of the police.

In sum, there is no proof beyond a reasonable doubt that any of the several confessions was voluntarily given. The record shows that some of the confessions, if not all, were the product of a will overborne by the cumulative effect of a virtual abduction by Detectives Daum and Carroll; continuous incommunicado interrogation of a known addict over a period of five or more hours in the course of an evening that ends with the petitioner in the hospital. A finding of guilt if based only in part upon a single involuntary confession is violative of due process. *Lisenba v. California*, 314 U.S. 219, 236.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

July 4, 1969.

Respectfully submitted,

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